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No. 07-1482

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2007

NATHANIEL QUARTERMAN,
Director, Texas Department of Criminal Justice
Correctional Institutions Division,
Petitioner,

v.

CHARLES E. MINES, JR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[CAPITAL CASE]

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QUESTIONS PRESENTED
(RESTATED)

CAPITAL CASE

1. Having previously directed the Texas Court of Criminal Appeals ("CCA") to reconsider its denial of relief to Respondent under *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), in light of *Johnson v. Texas*, 509 U.S. 350 (1993), should this Court now grant plenary review to address the correctness of the Court of Appeals' brief, unpublished *per curiam* opinion holding that the CCA on remand from this Court acted unreasonably in not granting *Penry* relief?

2. Should this Court accept Petitioner's invitation to decide whether *Penry* error is subject to harmless-error analysis, where Petitioner waived that issue by not raising it until the fifteenth year of state and federal litigation over Respondent's *Penry* claim, the issue concerns a statute repealed in 1991 that affects fewer than a dozen or so inmates, the type of error caused by the pre-1991 Texas statute was unique in capital sentencing, and the powerful mitigating evidence of mental disability that Respondent's jury was precluded from considering leaves no doubt that the error was harmful under any standard?

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PRIOR PROCEEDINGS

More than fifteen years ago, Respondent ("Mr. Mines") asserted on direct appeal his constitutional challenge to the deficiency of the former Texas "special issue" scheme as applied to his mitigating evidence of severe mental illness. His claim was rejected on the merits by the Court of Criminal Appeals of Texas ("CCA"). *Mines v. State*, 852 S.W.2d 941 (Tex. Crim. App. 1992). This Court ordered reconsideration of Mr. Mines' case in light of *Johnson v. Texas*, 509 U.S. 350 (1993), notwithstanding the fact that it denied review in the vast majority of Texas capital cases that had been "held" pending *Johnson*. *Mines v. Texas*, 510 U.S. 802 (1993). The CCA again affirmed. *Mines v. State*, 888 S.W.2d 816 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1117 (1995).

Mr. Mines pursued his *Penry* claim on federal habeas; after the district court denied relief, the Court of Appeals granted a Certificate of Appealability on the issue. *Mines v. Dretke*, 118 Fed. Appx. 806 (5th Cir. 2004) (unpublished). After briefing and oral argument, the Court of Appeals granted relief in a short, unpublished *per curiam* opinion. *Mines v. Quarterman*, 267 Fed. Appx. 356 (5th Cir. 2008) (unpublished).

Since September 2000, when Mr. Mines initiated this action in federal district court, Petitioner has filed at least six separate federal pleadings responding to Mr. Mines' *Penry* claim.[1] Yet, Petitioner never even mentioned the words "harmless error" until the very last one – its letter brief in the Court of Appeals dated July 6, 2007.

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[1] We refer specifically to (1) Petitioner's original answer in the district court (filed June 18, 2001); (2) its opposition to Mr. Mines' motion under Fed. R. Civ. P. 59(e) in the district court (filed September 5, 2003); (3) its opposition to a Certificate of Appealability in the Court of Appeals (filed April 9, 2004); (4) its brief on the merits in the Court of Appeals (filed May 2, 2005); (5) its first supplemental letter brief in the Court of Appeals regarding Mr. Mines' *Penry* claim (filed at that court's request on April 5, 2007); and (6) its letter brief in the Court of Appeals regarding the impact on Mr. Mines' *Penry* claim of

RELEVANT FACTS[2]

i. Introduction

Petitioner makes two serious omissions in his recitation of the relevant facts. First, he attempts to minimize the significance of the mitigating evidence Mr. Mines' jury heard about his severe mental illness. *See, e.g.,* Petition for Writ of Certiorari ("Petition") at 18 (calling that evidence "weak and incredible"). Second, Petitioner fails even to mention the extent to which the record reinforces the inference that jurors could only have interpreted the former Texas sentencing statute as forbidding any broad inquiry into Mr. Mines' moral culpability. Because the correctness of the Court of Appeals' ultimate conclusion – that the CCA's rejection of Mr. Mines' *Penry I* claim on remand from this Court was objectively unreasonable – cannot be evaluated outside the context of those facts, we will examine them in somewhat greater detail.

First, however, one additional correction is in order. Petitioner asserts that "[Mr.] Mines' jury, having been empaneled shortly after *Penry I* was decided, was given the supplemental instruction later found to be an inadequate remedy in *Penry v. Johnson*, 532 U.S. 782 (2001)." Petition at 12; *see also* Petition at 19 ("... the instructions given to [Mr. Mines'] jury were problematic under both *Penry I* and *Penry II*"). These statements are incorrect. Mr. Mines' jury was in fact seated in May 1989, about a month *before* this Court handed down its opinion in *Penry I* on June 26, 1989. *See, e.g.*, RR IX at 1 (first

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this Court's decision in *Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (filed July 6, 2007). Nor did Petitioner advance any harmless-error argument respecting Mr. Mines' *Penry* claim at oral argument in the Court of Appeals on November 6, 2007.

[2] Following Texas practice, we cite the appellate record from Mr. Mines' trial as "CR" ("Clerk's Record"), and the verbatim transcript of trial testimony as "RR" ("Reporter's Record"). *See* Tex. R. App. Proc. 34.5 and 34.6.

day of trial testimony was "the 31st day of May, 1989"). Further, contrary to Petitioner's statement, no "nullification" instruction (like the one at issue in *Penry II*) was included in the penalty-phase jury charge in Mr. Mines' trial. *See* CR at 113-116 (court's charge to the jury at punishment).

ii. The powerful evidence of Mr. Mines' severe mental illness

Mr. Mines was initially arrested and jailed for aggravated robbery. On May 18, 1988, after a court-appointed psychiatrist twice found Mr. Mines incompetent to stand trial, that charge was dismissed on the State's motion. *See* CR at 9, 11; RR X at 198; Defense Exhibit 1. Mr. Mines was then committed to Terrell State Hospital (a state-run mental institution) following a court finding that he was dangerous to himself and others. RR X at 195-96, 198-99.

Mr. Mines was released from Terrell State Hospital on May 24, 1988. Three days later, not having eaten since his release, he decided to break into a house to get something to eat. RR X at 82. He knocked on the door of the home of Vivian and Frances Moreno, getting no answer. *Id.* at 81. After waiting for awhile and seeing no one about, he entered the house by climbing through a window leading into a closet in the rear bedroom. *Id.* at 42. Surprised in the bedroom by Vivian Moreno, Mines struck her repeatedly with a hammer; when Frances attempted to intervene, he assaulted her as well. *Id.* at 82. Vivian died from her injuries; Frances survived, gravely injured. *Id.* at 122, 142-45.

On May 30, 1988, police officers found Mr. Mines, with clothing and food apparently taken from the Morenos', living at a makeshift campsite in the woods just 75 yards from the crime scene. RR X at 46, 51. Mr. Mines was arrested and taken to jail.

Id. at 53. During the "book-in procedure," Mr. Mines refused to identify himself and behaved bizarrely when asked for his name. *Id.* at 74, 139. Three days later, after having repeatedly refused to sign any documents acknowledging that he understood his rights, Mr. Mines confessed. *Id.* at 80-83, 100, 105-06; State's Exhibits 1-5.

At trial, a plea of not guilty by reason of insanity was entered on Mr. Mines' behalf. RR X at 21. Psychiatrist Ricardo Schack, M.D., testified for the defense at the guilt phase. Dr. Schack testified that he had evaluated Mr. Mines several times over approximately seven months, during which period he had seen no significant changes in Mr. Mines' behavior. *Id.* at 155-160, 168. Because of Mr. Mines' consistently high level of agitation, the jailer was uncomfortable removing Mr. Mines from his cell; thus, most of Dr. Schack's interviews were conducted at cell-side. *Id.* at156.

Dr. Schack testified that he diagnosed Mr. Mines with a manic depressive illness and bipolar disorder, a severe mental disease or defect in which the brain goes into "overdrive." RR X at161, 188. He stressed that bipolar disorder is lifelong, biological and brain-based; when the illness is active, "the brain starts doing things not the way it is supposed to." *Id.* at163.[3] According to Dr. Schack, when the illness is active one's thinking "becomes irrational," as a result of which the sufferer "becomes very impulsive" and "may become violent ... [or] dangerous." *Id.* at 161-62. Individuals suffering from this illness can experience both paranoid and grandiose delusions; Mr. Mines himself told Dr. Schack that he was a very important person. *Id.* at166, 185. A person suffering from

[3] Dr. Schack contrasted Mr. Mines' physically based disorder with psychological trauma, stressing that bipolar disorder is "not due to the fact that we were spanked too hard when we were kids or something like that." *Id.*

bipolar disorder may ignore personal hygiene[4] and say things like "everybody else is crazy." *Id.* at 167. Individuals suffering from this condition, like Mr. Mines, are typically uncooperative, though their behavior patterns are variable.[5] *Id.* at 186. Indeed, when Dr. Schack first visited, Mr. Mines was "very, very hostile" towards him; Mr. Mines was "very agitated," "verbally abusive," spoke loudly, and was largely uncooperative, in effect giving only his "name, rank and serial number." *Id.* at 160, 165-67.[6] It was very difficult for Dr. Schack to converse with Mr. Mines; efforts to do so triggered a "constant argument." *Id.* at 168. Mr. Mines' judgment also appeared poor. *Id.* at 174.[7] Dr. Schack found that Mr. Mines possessed every diagnostic feature of bipolar disorder to some degree. *Id.* at192.

Dr. Schack acknowledged that bipolar disorder is changeable, cyclical, extremely variable, and can go into remission. RR X at 162, 189. Indeed, he explained that changeable behavior patterns are consistent with the nature of this disorder. *Id.* at 186, 187. Nevertheless, Dr. Schack concluded that Mr. Mines, as a result of his bipolar disorder, had been legally insane (*i.e.*, could not tell right from wrong) at the time of the offense on May 27, 1988. *Id.* at169, 170-71, 195.

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[2] Jailers complained that Mr. Mines, while awaiting trial, "stank to high heaven because he refused to bathe." RR XII at 14.

[5] Dr. Schack explained that a person so mentally ill as to be legally "insane" might nevertheless be intelligent, speak normally, be alert and aware of his surroundings, converse on a number of subjects, behave pleasantly and courteously, and generally appreciate what "is going on." RR X at 165.

[6] The last time Dr. Schack saw Mr. Mines, in the early spring of 1989, he was only "slightly less agitated." *Id.*

[7] Dr. Schack based this inference in part on Mr. Mines' comment that he did not want a lawyer and didn't "recognize" his lawyer. *Id.*

The State called James Grigson, M.D. Mr. Mines had refused to be examined by Dr. Grigson, and so Grigson's jail visit with him lasted only a couple of minutes. RR X at 213. Mr. Mines did not speak to Dr. Grigson at all. *Id.* at 207. Dr. Grigson nevertheless expressed the opinion, based on a review of Mr. Mines' records from Terrell State Hospital and what he observed during his brief encounter with Mr. Mines in the jail, that Mr. Mines did not suffer from bipolar disorder. *Id.* at 206-08. Rather, Dr. Grigson said, Mines exhibited a "mixed personality disorder." *Id.* at 211.

The State also called Dr. Quynn Nguyen, who had seen Mr. Mines at Terrell State Hospital during Mr. Mines' commitment there from May 19 through May 24, 1988. RR X at 218-224. Dr. Nguyen testified primarily from notes, having little independent recollection of Mr. Mines. *Id.* at 242. According to Dr. Nguyen's notes, Mr. Mines denied having any psychological problems and insisted he had been jailed in Ellis County for "no reason." *Id.* at 226-27, 231. Mr. Mines claimed he had been in jail because he was found to have over $1000 cash in his pocket; Mr. Mines said he usually carried large amounts of cash to help him "make a deal." *Id.* at 213.

According to Dr. Nguyen's notes, Mr. Mines gave appropriate responses on his initial interview and had no problems interacting with others at the hospital. RR X at 226-27, 229. Dr. Nguyen conceded, however, that Mr. Mines was friendly, cooperative and calm only until his views were challenged; then he became loud and argumentative. *Id.* at 234. Dr. Nguyen also noted that Mr. Mines refused a physical examination because he did not like the people at the administration center. *Id.* at 233.

Dr. Nguyen agreed with Dr. Grigson that Mr. Mines exhibited a mixed personality disorder, and noted that he was anti-social, passive-aggressive, and possibly

paranoid. RR X at 237-38. While Mr. Mines displayed "many other symptoms of different types," Dr. Nguyen concluded he did not suffer from any mental illness or medical disease. *Id.* at 238-39. On Dr. Nguyen's recommendation, Mr. Mines was released from the hospital three days before the murder. *Id.* at 241.

The jury convicted Mr. Mines of capital murder and the case proceeded to the punishment phase.

The State first introduced proof of Mr. Mines' prior convictions from Virginia and North Carolina. RR X at 277-79. It then re-called Dr. Grigson, who testified in response to a hypothetical that a person matching the facts of Mr. Mines' case would commit future acts of criminal violence. *Id.* at 282. Dr. Grigson testified that, "regardless of whether the individual [described in the hypothetical] has bipolar or heart trouble, that individual has demonstrated repeated acts of violence, and, therefore, is going to commit future acts of violence." *Id.* at 282-83.

The defense re-called Dr. Schack. Dr. Schack testified that bipolar disorder can be controlled or altered with treatment, which would reduce the odds of future acts of violence. RR X at 286. He was forced to acknowledge, however, that if untreated, Mr. Mines had a high probability of committing repeated acts of violence. *Id.* at 288.

The jury answered all three special issues "yes," requiring the trial court to impose a death sentence. RR X at 317-18; CR 113-115.

iii. Comments during jury selection and at closing argument emphasized the narrow scope of the former Texas capital sentencing statute.

During voir dire and argument, the prosecuting attorney emphasized the narrow scope of the former Texas capital sentencing statute. Respecting the former first special issue, which asked whether the defendant had killed "deliberately," the prosecutor

advised jurors that in common understanding there was little difference between "deliberately" and "intentionally," the *mens rea* for conviction of capital murder under the indictment in Mr. Mines' case. The prosecutor's exchange with juror Arnold is representative. The prosecutor explained to Arnold that "if you are like most people, you kind of shake your head and say what's the difference [between intentional and deliberate]. It's pretty much the same. And they are very similar." RR IV at 89. The prosecutor added that deliberateness "could be shown by just exactly the same evidence that showed that he committed the offense intentionally." *Id.* The juror agreed: "It's like you say, they both almost mean the same thing to me." *Id.* In response, rather than stressing whatever difference might exist between the terms, the prosecutor emphasized that little separated them: "It's very similar ... [Deliberately] is a little more than just intentionally, but it's not a great deal more...." *Id.* at 90. The prosecutor sympathetically pointed out that distinguishing intentionally and deliberately is "really exceptionally hard...." *Id.*[8]

And during closing argument at the penalty phase, the prosecutor *expressly equated* the key terms:

> On the issue[] of deliberateness, you don't have to plan and plot for a week or a day or an hour or five minutes for something to be deliberate. And the Judge hasn't instructed you [what] deliberate means. ... **But you all know what it means to do something deliberately. To form – *to form the intent to do something*.** It's not a matter of a long plot or strategy.

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[8] *See also, e.g.*, RR IV at 60 (prosecutor to juror Pipes: deliberately is "very similar" to intentionally and "we are not going to define that for you," "It's not like we are going to bring in a pile of more evidence to show you that it was deliberate that we did not show you [in] the first part of [trial, *i.e.*, the guilt phase]"); RR IV at 8 (prosecutor to juror Gentry: deliberate is "something more than ... intentional or something less than premeditation," and will be "shown with the same evidence that showed you the Defendant intentionally committed the offense").

RR X at 314 (emphases added).

The constricting effect of the pre-1991 Texas statute on the jury's ability to consider and give effect to Mr. Mines' evidence of severe mental illness was also reflected in defense counsel's penalty-phase closing argument. Defense counsel focused on Mr. Mines' bipolar disorder as the central reason for sparing Mr. Mines' life, but counsel's attempts to shoehorn the evidence into the former special issues eventually gave way to simply urging that the jury could not in good conscience sentence Mr. Mines to death – despite the fact that there was no way for the jurors, if they followed their oaths, to give effect to that conclusion. *See, e.g.*, RR X at 303 (arguing that jurors "can answer that one [the "deliberateness" issue] no"), *id.* at 300-01 ("[T]he truth of it is, and there is no way you can ever deny this, the truth is this guy is mentally ill"), *id.* at 304 ("How anybody can order the execution of a person with a mental disease or defect, so they don't know the answer to – they are not responsible for the consequences of what they do. It is completely beyond me.").[9] In response, the prosecutor vigorously reminded the jurors that they had "taken an oath to return that true verdict" and that they were obliged to do so even if "it is going to be difficult for you." RR X at 316.[10]

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[9] These arguments were remarkably similar to those at Penry's own (initial) trial. Penry's defense counsel initially urged the jury to answer the first special issue "no" because "it would be the just answer, and [a] proper answer." *Penry I*, 492 U.S. at 325. Ultimately, however, Penry's counsel, like Mr. Mines', was reduced to simply arguing that it would be wrong to sentence someone to death who labored under such a mental disability: "[A] boy with this mentality, with this mental affliction, even though you have found that issue against us as to insanity, I don't think that there is any question in a single one of [your] minds that there is something definitely wrong, basically, with this boy;" "[C]an you be proud to be a party to putting a man to death with that affliction?" 492 U.S. at 325.

[10] *Cf. Penry I*, 492 U.S. at 325 ("You've all taken an oath to follow the law and you know what the law is.... [Y]our job as jurors and your duty as jurors is not to act on your

SUMMARY OF ARGUMENT IN REPLY

Certiorari should be denied because the question presented is unworthy of this Court's attention. *See* Sup. Ct. R. 10 ("[C]ertiorari will be granted only for compelling reasons"). First, Petitioner appears to disagree with the holding below that Mr. Mines' jury, limited under Texas' long-abandoned capital sentencing scheme to answering questions about his "deliberateness" and "future dangerousness," and whether he acted in response to "provocation," could not have given meaningful mitigating effect to evidence of his severe bipolar disorder. *See* Petition at 20 (asserting that "[t]he Eighth Amendment ... was not offended" by the preclusive effect of the former Texas statute as applied to such evidence). The question whether evidence of a capital defendant's serious mental impairment could be given meaningful mitigating effect within the scope of the pre-1991 Texas statute, however, has already been put to rest by this Court. *See Abdul-Kabir v. Quarterman*, 127 S. Ct. 1654 (2007) (firmly answering that question "no"). And the Court of Appeals, with the benefit of this Court's guidance, unanimously concluded that a straightforward application of *Abdul-Kabir* to the facts of Mr. Mines' case required re-sentencing by a properly instructed jury. Indeed, the Fifth Circuit was sufficiently confident of the correctness of that legal judgment that it chose to express it in a brief, unpublished *per curiam* order.

Even if the Court of Appeals' conclusion on the merits were debatable, this sequence of events would not present a compelling case for this Court's intervention. *See* Sup. Ct. R. 10 (cautioning that "... certiorari is rarely granted when the asserted error

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emotions, but to act [on] the evidence that you have heard in this courtroom, then answer those questions accordingly").

consists of ... the misapplication of a properly stated rule of law"). The fact that the Court of Appeals' conclusion is indisputably a *correct* application of *Penry* and *Abdul-Kabir*, *see infra*, simply cements the case against this Court's granting certiorari. Indeed, elsewhere in his petition *Petitioner himself* curiously acknowledges that "there is no doubt the instructions given to the jury [in Mr. Mines' case] were problematic under ... *Penry I*." Petition at 19. At a minimum, this express concession indicates that no open question remains about the application of *Penry* to the facts of Mr. Mines' case which this Court could usefully answer by granting review.

Perhaps recognizing that there is no reasonable dispute that Mr. Mines' death sentence violates *Penry*, Petitioner belatedly seeks to raise a defense of harmless error. For many reasons, this case is an inappropriate vehicle for consideration of that issue, on which Mr. Mines would prevail in any event.

First and foremost, the Court could not reach the harmless-error issue without first disposing of the separate question whether Petitioner has waived any such defense. Since his direct appeal in *1992*, Mr. Mines has continuously asserted his challenge to the inadequacy of the pre-1991 Texas special issues as applied to his evidence of severe mental illness. Notwithstanding the extensive litigation over this claim in state and federal court, Petitioner did not raise the defense of harmless error until *2007*.

Federal law clearly establishes that the State's failure to raise the issue of harmless error in a timely manner waives that defense. *See* Section A *infra*. Accordingly, Petitioner having completely failed to appropriately argue harmless error either in federal district court or in its principal brief in the Court of Appeals, this Court need not and should not address the harmless error question presented. Because

Petitioner's waiver of the harmless-error defense is dispositive of any harmless-error issue, this case is not an appropriate vehicle for addressing that question; a grant of certiorari would likely result in an opinion that did not address or resolve the question presented.

Apart from this fatal procedural obstacle, several additional considerations compel the conclusion that this case is unworthy of review. First, there is no division whatsoever among federal courts on the merits of the purported harmless-error issue. When the question whether to apply harmless error analysis to *Penry I* claims was decided by the *en banc* Court of Appeals, not a single judge among the sixteen participating dissented from the conclusion that applying harmless error analysis to *Penry* claims was inappropriate. *Nelson v. Quarterman*, 472 F.3d 287 (2006) (*en banc*), *cert. denied*, 127 S. Ct. 2974 (2007). Since *Nelson*, every *Penry* decision within the Fifth Circuit has been unanimous, including the panel decision in this case, and most – again, like the decision here – have been unpublished, suggesting at a minimum that the issue pressed by Petitioner is not provoking the kind of debate in the court below that would require this Court's intervention.

More fundamentally, the question whether *Penry* error is subject to harmless error analysis has no continuing jurisprudential significance. *Penry* error could occur only under the former Texas capital sentencing statute, which was repealed in 1991, almost seventeen years ago. Few of the inmates sentenced under the old statute remain on death row (most have been executed) and only a small fraction – probably fewer than a dozen – are presently litigating claims under *Penry*. These are not circumstances that cry out for this Court's expenditure of its limited resources.

Moreover, the old Texas statute was an extraordinary outlier in two respects: its failure to provide any general vehicle for considering a defendant's evidence of reduced culpability and its focus on a defendant's dangerousness in every case. These same unique features of the long-abandoned Texas statute also explain why harmless error analysis is inapplicable to *Penry* error: the inadequacy of the former special issues to permit consideration of a defendant's evidence as *mitigating* coupled with its strong tendency to treat such evidence as *aggravating* influenced and distorted the presentation of such evidence at trial. As the Fifth Circuit has perceptively described this effect, defense counsel "was constrained by the sentencing instructions and special issues, which narrowed the jury's focus to the issues of deliberateness and future dangerousness." *Chambers v. Quarterman*, 250 Fed. Appx. 706, 707 n.1 (5th Cir. 2007) (unpublished). Where defense counsel was thus constrained, appellate courts cannot reliably depend on the trial record to assess the impact in a particular case of the defect in the pre-1991 Texas statute, making accurate and fair harmless error review impossible. Even if a reviewing court could conceivably undertake to inquire outside the trial record to create a factual basis that would permit such analysis, the proper development of such a record in this case (*e.g.*, via a hearing in state court or federal district court) was frustrated by Petitioner's failure to assert his harmless error defense in a timely manner.

Finally, the mitigating evidence presented by Mr. Mines – his severe, lifelong, biological, brain-based mental disorder – undoubtedly bears significantly on his moral culpability for his crime. Moreover, the failure of the former Texas special issues to permit the jury to consider this evidence as reducing his culpability was exacerbated by the fact that this mitigating evidence *supported* the State's case for death by

strengthening the inference of Mr. Mines' dangerousness. Under these circumstances, the *Penry* error in Mr. Mines' case must be deemed harmful under any standard, making his case an especially inappropriate vehicle for examining that issue.

In sum, even if the Court concludes that its attention might appropriately be devoted to considering the intricate legal question whether harmless error can apply to claims under *Penry*, this is not the case to grant for those purposes. Accordingly, the Court should deny certiorari.

A. This case is not an appropriate vehicle to assess whether *Penry* error can be deemed harmless because Petitioner waived this defense by failing to raise it in a timely matter.

In asking this Court to grant review, Petitioner offers no explanation for his failure to raise any harmless-error defense until fifteen years after Mr. Mines first presented his *Penry* claim. As noted, Mr. Mines raised the *Penry* claim in his direct appeal from his death sentence in 1992, and the CCA denied his claim on the merits; this Court remanded for further review, and the CCA adhered to its earlier denial of relief. At no time during that litigation over Mr. Mines' *Penry* claim – in the CCA and in this Court – did the State of Texas ever suggest that *Penry* claims were subject to harmless-error review generally *or* that the specific *Penry* violation in Mr. Mines' case was harmless.

Mr. Mines then pursued his *Penry* claim on federal habeas. Since September 2000, when Mr. Mines initiated this action in federal district court, Petitioner has filed at least six separate pleadings responding to Mr. Mines' *Penry* claim.[11] Yet, Petitioner never even mentioned the words "harmless error" until the very last one – its letter brief in the Court of Appeals dated July 6, 2007. In such circumstances, the lower federal

[11] *See* n. 1, *supra* (identifying those pleadings).

courts unvaryingly find any harmless-error defense to have been waived and abandoned. *See, e.g.*, *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005) ("Respondent also argues that any error in the jury instructions was harmless . . . . However, the Respondent did not make this argument in the district court, so it is waived."); *United States v. Cacioppo*, 460 F.3d 1012 (8th Cir. 2006) ("the Government did not argue that the alleged instruction error was harmless, and the failure to do so waives any right to such review"); *Lam v. Kelchner*, 304 F.3d 256, 269 (3rd Cir. 2002) ("The first flaw in the Commonwealth's harmless error argument is that it was never raised before the District Court and was therefore waived."); *Jenkins v. Nelson*, 157 F.3d 485, 494 n. 1 (7th Cir. 1998) ("[Petitioner] contends that Respondent has waived harmless error by failing to raise it before the district court. Generally, when a party fails to raise an issue in the district court, the issue is waived, and we will not consider it on appeal."); *Calvert v. Wilson*, 288 F.3d 823, 836 (6th Cir. 2002) (Cole, J., concurring) ("While a petitioner has the responsibility of ensuring that all claims in support of a petition for writ of habeas corpus are timely raised, so too does the warden bear the responsibility of ensuring all defenses, including harmless error, are timely raised."); *Nelson v. Quarterman*, 472 F.3d 287, 332 (5th Cir. 2006) (*en banc*) (Dennis, J., concurring) ("[T]he state can waive harmless error review by failing to raise the issue in a timely and unequivocal manner in the district court") (citing cases), *cert. denied*, __ U.S.___, 127 S. Ct. 2974 (2007); *see also* 2 Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice & Procedure § 31.2, at 1512 & n.1 (5th Ed. 2005) ("Like other defenses to habeas corpus relief, the 'harmless

error' obstacle does not arise unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense.").

Here, Petitioner not only failed to raise any harmless-error issue in federal district court; it failed to assert harmless error in its merits brief in the Court of Appeals *after* that court had granted a certificate of appealability on Mr. Mines' *Penry* claim. The Courts of Appeals routinely find arguments waived which are not presented in a party's principal brief on the merits. *See, e.g., United States v. Fields*, 483 F.3d 313, 352 n. 36 (5th Cir. 2007) (appellant waives issue by not raising it in his opening brief); *United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) (same); *cf., e.g., Holland v. McGinnis*, 963 F.2d 1044, 1057 (7th Cir. 1992) ("All arguments for reversal must appear in the opening brief, so that the appellee may address them. We have consistently refused to consider arguments withheld until the reply brief.") (internal quotation marks and citation omitted). Mr. Mines respectfully submits that this Court ought not to make a special exception to that settled practice in order to reach the issue urged by Petitioner.

Moreover, even when Petitioner finally raised the defense of harmless error for the first time in his July 2007 letter brief, he did not provide the Court of Appeals with a thorough account of the record to facilitate harmless-error review. Petitioner's entire argument focused on *whether* harmless-error analysis should apply, and he offered no discussion whatsoever of the evidence or arguments made at trial to support its claim that the *Penry* error was actually harmless *in Mr. Mines' case*. That omission independently justifies rejecting any harmless-error defense. *See, e.g., United States v. Vega Molina*, 407 F.3d 511, 524 (1st Cir. 2005) (where State made no substantial effort to explain why

constitutional errors were harmless, "we choose not to do the government's homework").[12]

Thus, despite filing numerous, extensive pleadings regarding Mr. Mines' *Penry* claim in both state and federal court since 1992, Petitioner never asserted prior to 2007 that relief should be denied on the ground that the *Penry* error in Mr. Mines' case could be deemed harmless. Even then, Petitioner's briefing on the issue was cursory, conclusory, and without any particularized discussion whatsoever of the record in Mr. Mines' case. Given that Petitioner offers no argument, much less any persuasive one, for this Court to review the unexceptional conclusion that Petitioner waived any claim of harmless error, this Court ought not to use this case as a vehicle for deciding whether *Penry* error can be deemed harmless.

B. The question presented has no jurisprudential or practical significance because it concerns a unique capital sentencing statute that was repealed almost seventeen years ago, and a vanishingly small number of inmates are currently litigating claims related to that long-abandoned statute.

The issue Petitioner urges the Court to accept for review is unworthy of the Court's attention because Petitioner has failed to demonstrate any disagreement among the judges of the Court of Appeals regarding whether harmless-error analysis should be undertaken with respect to *Penry I* claims. It is true that *Nelson v. Quarterman*, 472 F.3d

[12] Although some courts have determined that federal appellate courts retain discretion in limited circumstances to overlook waivers of the harmless-error defense, *see, e.g., United States v. Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999) (discussing factors for exercising discretion to overlook state's waiver of harmless-error argument), Mr. Mines respectfully suggests that this Court should not exercise that discretionary power here, especially in light of the substantial record in Mr. Mines' case. *Cf. Nelson*, 472 F.3d at 332 (Dennis, J., concurring in the judgment) (inappropriate to excuse the state's waiver where "[t]he record ... is substantial and the issues are complex").

287 (5th Cir. 2006) (*en banc*), in which the *en banc* Fifth Circuit finally brought its *Penry I* caselaw into compliance with this Court's individualization precedents, reflected deep divisions among the judges of that court regarding what type or extent of mitigating evidence might fall outside the scope of the pre-1991 Texas capital sentencing scheme – that is, what constitutes *Penry I* error in the first place.[13] But not a single member of the *en banc* Fifth Circuit in *Nelson* took the view that harmless-error analysis should apply to *Penry I* claims once a constitutional violation has been found, nor has that position been advanced in any concurring or dissenting opinion in any Fifth Circuit case on *Penry I* error decided since *Nelson*. Indeed, every Fifth Circuit opinion applying *Penry I* through the lens of *Nelson*, *Abdul-Kabir*, and *Brewer* has been decided *unanimously* – whether granting relief, as in Mr. Mines' case, or denying relief, as in *Smith v. Quarterman*, 515 F.3d 392 (5th Cir. 2008) At a minimum, it is a strong basis for denying review that Petitioner has utterly failed to show any disagreement among the judges of the court below regarding the precise legal issue Petitioner insists this Court should expend its limited resources to consider.

Moreover, the issue Petitioner urges this Court to address has only the narrowest and most fact-specific application, affecting only a handful of cases. First, the type of error in question arose only under Texas' former capital sentencing statute. That statute was nearly unique in the United States; the only other death penalty jurisdiction that attempted to employ a quasi-mandatory scheme like Texas' rigid special verdict format was Oregon, which never pursued many death sentences and in any event reformed its

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[13] Unsurprisingly, those divisions have disappeared since this Court subsequently clarified the scope of *Penry I* in *Abdul-Kabir* and *Brewer v. Quarterman*, 127 S. Ct. 1706 (2007).

statute altogether after *Penry I*. *See State v. Wagner*, 786 P.2d 93, 101 (Ore. 1990) (mandating that special issue questions be supplemented with broad instruction empowering jurors to give effect to mitigating evidence by imposing a sentence less than death).[14] Second, the type of error in question arose only in *certain cases* tried under the former Texas scheme, where the defendant presented mitigating evidence that had relevance to his personal culpability outside the scope of Texas' former "special issue" questions. *See Penry I*, 492 U.S. at 317-320 (former Texas scheme was not facially unconstitutional, but only defective as applied in certain factual contexts). Finally, the Texas Legislature nearly seventeen years ago replaced Texas' constitutionally problematic former statute with one that reliably conforms in every instance with constitutional requirements. *See Penry II*, 532 U.S. at 803 (noting the "brevity and clarity" of Texas' "clearly drafted" post-1991 statutory instruction on mitigating evidence). Thus, even in Texas, a ruling on the question presented here would have no prospective application whatsoever.

For all these reasons, the universe of *Penry I* claims is necessarily a decidedly limited one. Inmates sentenced under that long-abandoned statute constitute a tiny and dwindling minority of those currently on Texas's death row, and only a small fraction of

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[14] Notably, every single Oregon death sentence imposed prior to 1989 was reversed on the basis of this Court's decision in *Penry I*. *See* William R. Long, "A Tortured Mini-History: The Oregon Supreme Court's Death Penalty Jurisprudence in the 1990's," 39 WILLAMETTE L. REV. 1, 5 (2003) (describing the "immediate awareness [in Oregon] that *Penry* would require remands, if not retrials, of all twenty-three men on death row in 1989").

those inmates, likely only about a dozen, are presently litigating *Penry* claims.[15] Given the uniqueness of Texas' former statute, and of the constitutional error it sometimes generated, any principle this Court might announce in Respondent's case would have no general application to the administration of capital punishment across the Nation. For all these reasons, this Court's intervention is unwarranted.

C. The same considerations that render the issue in this case uncertworthy – the unique problems presented by the former Texas statute – also provide compelling support for the view that harmless error analysis is inappropriate to *Penry I* claims.

The same features of Texas' former statute that would limit the applicability of any ruling by this Court on the question presented also explain why harmless error analysis of *Penry I* claims is inappropriate. The unique structure of the former Texas capital sentencing statute distinguishes it in at least two ways from other schemes this Court has examined for compliance with the individualization requirement, and to which it has suggested that harmless-error analysis might appropriately be applied.

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[15] Although more than a dozen inmates still on Texas' death row were sentenced under the pre-1991 scheme, many have no *Penry* claim to litigate, even if they presented potentially problematic mitigating evidence at trial. The Texas Court of Criminal Appeals has concluded that Texas' statutory "abuse of the writ" doctrine will sometimes bar litigation of *Penry* claims in such cases. *See, e.g., Ex parte Hood*, 211 S.W.3d 767 (Tex. Crim. App. 2007). Condemned Texas prisoners sentenced under the pre-1991 statute who did not present a *Penry* claim in an earlier federal habeas proceeding are likewise precluded from doing so now, *see In re Kunkle*, 398 F.3d 683, 684-85 (5th Cir. 2005) (*Penry* claims do not satisfy the statutory conditions for obtaining merits review in a second or successive federal habeas application), and those who unsuccessfully urged the claim in an earlier federal habeas application are likewise barred from raising it anew. *See* 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application ... that was presented in a prior application shall be dismissed"). For all these reasons, the number of death-sentenced Texas prisoners who were tried under the pre-1991 statute, but are nevertheless still in a position to assert a *Penry* claim at this late date, is vanishingly small.

First, the inflexible nature of the pre-1991 Texas scheme severely constrained the development and presentation of the case for life – including both the mitigating evidence offered, and defense counsel's argument to the jury. Simply put, Texas lawyers charged with the responsibility of presenting a case in mitigation were aware that the jury would not be authorized to give consideration and effect to evidence demonstrating the defendant's reduced moral culpability. Instead, as defense counsel knew, the jurors would be directed to return answers only to the questions on the statutorily mandated verdict form, asking whether the defendant had killed "deliberately" and might present a threat of future criminal violence, and those bare "yes" or "no" answers would dictate the defendant's sentence.

Reasonable defense lawyers, facing that litigation environment, struggled to decide how much and what type of mitigating evidence to risk presenting, given that – as *Penry I* eventually recognized – much relevant evidence of diminished culpability would also tend to support an affirmative answer to the "future dangerousness" question, and thereby expose the client to a death sentence. In effect, defense lawyers who chose to present such mitigating evidence notwithstanding the constraints of the pre-1991 Texas scheme were gambling with their clients' lives that the jurors would, in essence, nullify the verdict form in order to guarantee a life sentence. *See May v. Collins*, 904 F.2d 228 (5th Cir. 1990) (Reavley, C.J., and King, C.J., specially concurring) (observing that jurors in Texas capital cases tried before *Penry I* "were prevented from hearing extremely probative evidence on [the defendant's] moral culpability and on the appropriateness of a death sentence," depriving the defendant of the jury's "fully informed judgment of his crime and his character," because the "fixed state of the law" strongly counseled defense

attorneys in possession of such double-edged mitigating evidence to withhold it, lest they "do more harm than good by bolstering the state's case [for] future dangerousness").

As a result of the pressure the former Texas statute placed on reasonable defense counsel not to present "double-edged" mitigating evidence of diminished culpability, pre-*Penry I* capital trials in many Texas cases produced systematically distorted records that fail accurately to reflect the true balance of aggravating and mitigating circumstances. For this reason, the analytical tools reviewing courts usually employ in performing harmless-error analysis are unavailable in the *Penry I* context. As this Court is aware, assessing the harm from a constitutional violation in a capital sentencing hearing typically involves examining the range of aggravating and mitigating circumstances presented, the strength of the evidence supporting the existence of those factors, the nature and character of the arguments of counsel, and so on. But those elements of the sentencing record are precisely the ones that were cut to fit the Procrustean bed of the pre-1991 Texas scheme. In the absence of a vehicle to permit the meaningful consideration of mitigating evidence – and in the threatening presence of a mandatory "future dangerousness" inquiry that could turn otherwise powerful mitigating evidence of diminished culpability into support for a death sentence – defense attorneys may well have downplayed mitigating evidence that in a properly functioning scheme would have served as the centerpiece of counsel's case for life. As a result, any attempt to perform harmless-error analysis of the sentencing record in such cases, where every aspect of defense counsel's sentencing presentation was constrained and informed by the unique former Texas statute, would be purely and irreducibly speculative. *Penry I* error can hardly be "quantitatively assessed in the context of other evidence presented," *Arizona v.*

Fulminante, 499 U.S. 279, 307-08 (1991), because the most pernicious consequence of the pre-1991 statutory scheme may have been that key evidence was *not* presented or argued to the jury.

At a minimum, accurately assessing the harm flowing from the preclusive effect of the pre-1991 Texas statute in such cases would require giving the defendant an opportunity to demonstrate, at a hearing, that his counsel's presentation was distorted in this manner, and to place into evidence the fully developed case in mitigation that would have been presented if the proceeding had been governed by a fully functioning constitutional sentencing statute (like the post-1991 Texas scheme). This marks another way in which Mr. Mines has been substantially prejudiced by Petitioner's inexcusable delay in asserting the harmless-error defense to Mr. Mines' *Penry I* claim in the first place. Had Petitioner timely asserted that defense, Mr. Mines could have presented these arguments to the courts below, and could have sought a fair opportunity in state court or federal district court to make a full record of the extent to which the preclusive impact of the former Texas statute distorted the evidentiary picture that emerged at the sentencing hearing in his case. Petitioner's dilatory tactics have made that impossible.

In the final analysis, however, even armed with a detailed record of the additional mitigating evidence and argument that the jury would have heard, had Texas' pre-1991 statute not exercised a distorting influence over defense counsel's development and presentation of Mr. Mines' case for life, a reviewing court would nevertheless find itself reduced to speculation in trying to reconstruct how a properly instructed jury might have responded to that evidence. That consequence follows from the pre-1991 statute's most distinctive feature – its lack of any straightforward vehicle for the jury to express its

global conclusion regarding the appropriate sentence for the defendant. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court recognized that "the entire premise" of conventional constitutional harmless-error review is that there exists a jury verdict on the ultimate issue "upon which harmless-error scrutiny can operate." *Id.* at 280. In other words, harmless-error analysis assumes that the jury's verdict will serve as a point of departure for examining whether that verdict might have been affected by (*e.g.*) the admission of improper evidence, the exclusion of proper evidence, an improper argument by counsel, or the omission of an element of the offense from the jury's charge. In *Sullivan*, the jury had been directed to apply an improperly burdensome definition of "reasonable doubt," the indispensable term in judging guilt, in deciding the case; as a result, there was *no verdict* finding Sullivan guilty within the meaning of the Anglo-American legal tradition, and thus no baseline from which a reliable harmless-error analysis could proceed.

Precisely the same is true of the former Texas system. By design, it lacked any vehicle for the jury to express its ultimate conclusion about the appropriateness of a death sentence for the particular defendant. And, as explained above, the absence of any such vehicle sharply constrained defense counsel's presentation and argument of the evidence that might have supported a life sentence in a particular case. Thus, in cases presenting *Penry I* error, just as in *Sullivan*, there is no underlying verdict – *i.e.*, no expression by the jury of the conclusion that death is the appropriate sentence – which a reviewing court can take as the starting point for considering how that verdict might have been influenced by the constitutional violation. Indeed, the vice of the pre-1991 Texas scheme was precisely that, where the defendant had presented mitigating evidence bearing no

straightforward mitigating relationship to deliberateness or dangerousness, a reviewing court could have no confidence that the sentence automatically triggered by the jury's answers to the special issues corresponded to its assessment of the appropriate sentence. *See Penry I.* In the absence of such a verdict, "[a] reviewing court can only engage in pure speculation" about the extent to which the particular constitutional violation may have affected the outcome. *Sullivan*, 508 U.S. at 281. Moreover, in cases tried prior to *Penry I*, there is an unacceptable risk that the very trial record itself – the locus of attention in conventional harmless-error analysis, *see supra* – has been distorted by the former statute's tendency to keep vital double-edged mitigating evidence of reduced culpability out of the record.

For all these reasons, Petitioner's breezy suggestion that *Penry I* error constitutes run-of-the-mill jury instruction error is insupportable. We note that it is not necessary to find that *Penry I* error is "structural" error in the sense that it produces a "defect in the … trial mechanism," *Fulminante*, 499 U.S. at 309, to conclude that harmless-error analysis is inappropriate for such claims. As this Court has noted, the status of a constitutional violation as "trial error" is not always "the touchstone for the availability of harmless-error review." *United States v. Gonzalez-Lopez*, 548 U.S. 140, __ n.4, 126 S. Ct. 2557, 2564 (2006). Instead, the Court has seen fit to "rest [its] conclusion of structural error upon the difficulty of assessing the effect of the error." *Id.* Treating "fundamental unfairness as the sole criterion of structural error" is "inconsistent with the reasoning of [this Court's] precedents," which do not support the "assert[ion] that *only* those errors that *always* or *necessarily* render a trial fundamentally unfair and unreliable are structural." *Id.* (emphases in original). Petitioner apparently urges the same view as the

Gonzalez-Lopez dissenters, maintaining that despite the *Penry I* error, Mr. Mines' sentencing trial was somehow constitutionally fair. Petition at 20 (asserting that "nothing in the record suggests that the death sentence imposed [on Mr. Mines] reflects something less than the jury's 'reasoned moral response'"). On the contrary: Mr. Mines had a trial marred by the pervasive effect of Texas' unconstitutionally preclusive pre-1991 sentencing statute, and *this Court has held* that a jury constrained by the pre-1991 Texas scheme had no vehicle for expressing its "reasoned moral response" to evidence of severe mental impairment like Mr. Mines' by imposing an appropriate sentence. *See Penry I*, 492 U.S. at 322. As Mr. Mines has explained, assessing the effect of that *Penry I* error presents unique and substantial difficulties that justify foregoing harmless-error review, in part because such analysis necessarily would include, at a minimum, "difficult inquiries concerning matters that might have been, but were not, placed in evidence." *Rose v. Clark*, 478 U.S. 570, 579-80 and n.7 (1986).

In describing "structural errors" which do not lend themselves to harmless error analysis, this Court has focused on errors that affect the overall manner in which evidence is received or considered as opposed to those involving the erroneous admission or exclusion of particular pieces of evidence. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279 (1991) (finding it possible to assess the impact of an erroneously admitted involuntary statement on the overall evidentiary picture). But a sentencing scheme that conditions jurors' consideration of a defendant's constitutionally relevant mitigating evidence on their willingness to disregard their oaths is precisely the sort of structural error that cannot be subject to routine harmless error review. The central feature of *Penry I* error is that it puts jurors to an intolerable choice: they must either answer the special

issues truthfully, in which case they are not only precluded from giving mitigating effect to evidence like Mr. Mines' severe mental illness, but must actually give it *aggravating* effect; or they must disregard their oaths and answer the special issues *falsely* in order to reflect their conclusion that the mitigating evidence justifies a sentence less than death. *Cf. Beck v. Alabama*, 447 U.S. 625, 642 (1980) (error is not subject to harmless-error analysis is impossible where a reviewing court is reduced to "purest conjecture" about the basis for the jury's action). From a practical point of view, a reviewing court cannot possibly gauge the effect of such error, because it could only speculate about the jurors' willingness to lie in order to give mitigating effect to the defendant's evidence. A sentencing scheme under which jurors could only give mitigating effect to evidence of severe mental disability by falsifying their answers on the statutorily required verdict form – whether or not jurors were expressly instructed to that effect – is fundamentally flawed in a way that can never be dismissed as harmless, because it introduces a type of capriciousness impossibly inconsistent with the command for heightened reliability in capital cases.[16]

Finally, these unique aspects of the *Penry I* problem – the absence of a verdict regarding the appropriate sentence that could serve as the point of departure for harmless-error review, and the distortion of the trial record that likely resulted from the preclusive effect of the former Texas scheme – distinguish *Penry I* errors from other

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[16] Indeed, the "*Penry I*" situation, in which jurors must decide for themselves what to do where the statutorily required verdict form does not permit them to express their reasoned moral response to the mitigating evidence in the form of an unambiguous vote for life, is arguably even more likely to be harmful to the defendant than the "*Penry II*" situation (*see Penry v. Johnson*, 532 U.S. 782 (2001)), in which jurors are at least instructed by the trial court – however confusingly – that endorsing a literally false answer to one of the "special issues" is permitted under special circumstances.

individualization errors which the Court has suggested might be subject to harmless error review, such as *Hitchcock* error under the *Proffitt*-era Florida capital sentencing statute. *See Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Proffitt v. Florida*, 428 U.S. 242 (1976). Under the former Florida scheme, large reservoirs of mitigating evidence could be directly addressed by jurors within the scope of the enumerated mitigating factors – including several that spoke very broadly to evidence of diminished moral culpability that would have functioned as aggravating (and therefore been withheld by reasonable defense counsel) under the pre-1991 Texas scheme.[17] Equally important, the version of the Florida statute at issue in *Hitchcock* expressly directed that the jury return a general sentencing recommendation, based on its weighing of aggravating and mitigating circumstances, expressing its conclusion "whether the defendant should be sentenced to life (imprisonment) or death" – precisely the sort of verdict that could serve as the basis from which meaningful harmless-error review could proceed, and precisely the type of verdict that was completely *absent*, by design, from the pre-1991 Texas statute. *See Proffitt*, 428 U.S. at 248 (describing Florida statute). Thus, even if *Hitchcock* can be read to support the conclusion that harmless-error review might be appropriate for certain individualization errors occurring under certain statutory schemes, it offers no support whatsoever for Petitioner's claim that *Penry I* error falls into that category.[18] Indeed, the

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[17] For example, the *Proffitt*-era Florida statute expressly authorized jurors to consider as mitigating, *inter alia*, the "influence of extreme mental or emotional disturbance" on the defendant's state of mind at the time of the crime; whether the defendant "acted under extreme duress," and whether his "capacity ... to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." *See Proffitt*, 428 U.S. at 248 n. 6.

[18] Petitioner substantially overstates the case in claiming that this Court has "determin[ed] that *Hitchcock* error can be harmless," Pet. at 14. The Court in *Hitchcock* simply

only relevant observation from *Hitchcock* is that a State's failure to make a timely assertion of a harmless-error defense precludes application of that doctrine.

D. The strength of the mitigating evidence presented by Mr. Mines precludes a finding of harmlessness under any standard and thus counsels against use of this case as vehicle for addressing the highly-technical, statute-specific issue.

Finally, the circumstances of this case compel a finding of harm under any standard, which makes this case a particularly poor vehicle for addressing the harmlessness issue.

As an initial matter, Mr. Mines' extensive mitigating evidence – which showed that he suffered from a life-long, brain-based severe mental disorder with pervasive impact on his ability to control his impulses – was precisely the kind of evidence this Court has specifically identified as highly relevant to the life-or-death decision. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 288 (2004) (defendant's "[i]mpaired intellectual functioning" was mitigating); *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (finding reasonable probability that evidence of Williams' mental impairments would have "influenced the jury's appraisal of his moral culpability"); *Buchanan v. Angelone*, 522 U.S. 269, 278 (1998) (jury instructions sufficient to permit consideration of defendant's "mental and emotional problems"); *McKoy v. North Carolina*, 494 U.S. 433, 437 (1990) (reversing where jury instruction precluded consideration of evidence that McKoy, *inter alia*, exhibited signs of mental disturbance); *Bell v. Ohio*, 438 U.S. 637, 641-42 1978) (reversing where sentencer could not give independent mitigating effect to the fact that the defendant was "mentally

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observed that the State – like Petitioner *here*, at almost every prior stage of the proceedings – had made no effort whatsoever to argue that the error in Hitchcock's case was harmless. Accordingly, the Court simply proceeded to reverse his death sentence. *Hitchcock*, 481 U.S. at 399. That observation does not a holding make.

deficient"); *Mills v. Maryland*, 486 U.S. 367, 370 n.1 (1988) (same, where jury could not give effect to defendant's "minimal brain damage"); *California v. Ramos*, 463 U.S. 992, 995 n.2 (1983) (defendant's mitigating evidence included "mild congenital brain damage"); *Florida v. Nixon*, 543 U.S. 175, 192 (2005) (the defendant's possible brain damage was a mitigating factor reasonable defense counsel could have emphasized); *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005) (finding prejudice from, *inter alia*, defense counsel's failure to discover the defendant's organic brain impairment); *Woodford v. Viscotti*, 537 U.S. 19 (2002) (*per curiam*) (state court properly considered the totality of the mitigating evidence because it specifically considered expert testimony that the defendant "had a minimal brain injury of a type associated with impulse disorder ....") (citation and internal quotation marks omitted)).

In this case, there is a much greater likelihood of harm from the absence of any vehicle allowing the jury to consider Mr. Mines' severe mental disorder as mitigating. The reason why is simple: because the defense had argued throughout the guilt phase that Mr. Mines' bipolar disorder was the proximate cause of his savage attack on Mrs. Moreno and her daughter. *See, e.g.*, RR X at 268 (defense counsel's closing argument: "I'm just saying the man is insane. Everybody knew it. That's why what happened, happened."). Jurors need not have found Mr. Mines legally "insane" at that time of the crime in order to have agreed that Mr. Mines was seriously mentally ill and that his illness triggered the assault.[19] Moreover, the jury also heard that Mr. Mines had

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[19] Dr. Schack testified that when bipolar disorder is active, the sufferer may find it "very difficult" to control his behavior; even in court, many "simply cannot control themselves." RR X at 179. Since the Texas insanity defense contains no "volitional" component, but instead asks only whether the defendant knew right from wrong at the

committed other violent crimes in Virginia and North Carolina, and that Mr. Mines, when confronted, tended to erupt aggressively. RR X at 234. They heard that Mr. Mines' illness would make him "very impulsive" and lead him to "become violent ... [or] dangerous." *Id.* at 161. For all these reasons, here – as in *Tennard* – jurors almost certainly regarded Mr. Mines' bipolar disorder as requiring them to answer the future dangerousness question "yes," making the *Penry I* violation harmful under any standard of review.

For this reason, Petitioner's attempt to rely on the plurality opinion in *Franklin v. Lynaugh*, 487 U.S. 164 (1988) is particularly inapposite. *See* Petition at 20 (echoing the *Franklin* plurality's surmise that Texas jurors operating under the pre-1991 statute might have undertaken an "internal weighing" of the aggravating and mitigating aspects of a defendant's evidence) (citing *Franklin*, 487 U.S. at 182 n.12) (plurality opinion). But in subsequent close examinations of the former Texas scheme as applied in practice, this Court has come fully to appreciate that such a broad interpretation of the former "special issues" is directly contrary to the extraordinarily *narrow* manner in which Texas prosecutors in fact routinely instructed jurors to construe them. *See, e.g.*, *Tennard*, 542 U.S. at 288-89 (prosecutor encouraged jurors to give "aggravating effect [to Tennard's low IQ evidence] in considering his future dangerousness," emphasizing that under the Texas scheme "the reasons why [a defendant became] a danger [to society] are not really relevant"); *Brewer*, 127 S. Ct. at 1711 (prosecutor de-emphasized mitigating effect of

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time of the crime, *see* CR at 110, the jury may well have convicted Mr. Mines of capital murder even though they *also* concluded that his bipolar disorder made it impossible at times for him to control himself – an inference with obvious mitigating implications for Mr. Mines' personal culpability, but obvious aggravating implications for his "future dangerousness."

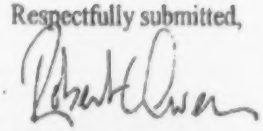
defendant's deprived background and argued that jurors "lacked the power [under the former Texas statute] to exercise moral judgment in determining Brewer's sentence," because their oaths limited them to "answer[ing] the questions according to the evidence"); *see also* Relevant Facts *supra* (describing prosecutorial comments during voir dire and closing argument in Mr. Mines' own case).

Accordingly, even if it were appropriate to apply harmless-error analysis to Mr. Mines' *Penry I* claim, the record in his case compels a finding of harm. The fact that applying harmless-error review ultimately would make no difference in the outcome is yet another reason making Mr. Mines' case a poor vehicle for examining the intricacies of the harmless-error doctrine as it might apply to *Penry I* claims.

CONCLUSION

The Court should deny *certiorari*.

Respectfully submitted,



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